STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **SURINDER AND VEENA AHUJA** for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Year 1996.	:	DETERMINATION DTA NO. 819353

Petitioners, Surinder and Veena Ahuja, 26 Grace Drive, Old Westbury, New York 11568, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the year 1996.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 1740 Broadway, New York, New York, on February 20, 2004 at 9:15 A.M. Petitioners appeared by Kestenbaum & Mark (Bernard S. Mark, Esq., of counsel) and K. K. Mehta, CPA. The Division of Taxation appeared by Mark F. Volk, Esq. (Susan Parker).

The final brief in this matter was filed by the May 14, 2004 due date and it is this date that commences the three-month period for the issuance of this determination.

ISSUE

Whether petitioners have met their burden of proof to show that their second amended return for 1996 claiming a refund of $22,955.00 was filed before the statute of limitations for claiming a refund expired.

FINDINGS OF FACT

1. Petitioners herein, Surinder and Veena Ahuja, filed a timely New York State resident personal income tax return for 1996 on or before April 15, 1997. On said return, petitioners reported New York adjusted gross income of $5,713,911.00 and computed and paid New York State personal income tax due of $406,236.00.

2. On or about May 18, 1998, petitioners filed with the Division of Taxation ("Division") an amended return for 1996 reducing reported New York adjusted gross income by $144,057.00. This reduction in reported income was the result of petitioners' receipt of an amended Federal Schedule K-1 which reduced their distributive share of partnership income by $144,057.00. The Division accepted the amended return as filed and on or about July 17, 1998 it issued to petitioners a refund of $10,264.00, plus interest.

3. Approximately one year later, the Division, on August 2, 1999, issued Notice of Deficiency L-016460121 to petitioners for 1996 asserting additional New York State personal income tax due of $3,506.14. The additional tax due was the result of petitioners' failure to increase Federal adjusted gross income for 1996 by $49,209.00 pursuant to Tax Law § 612(b)(3) for their pro rata share of the income taxes deducted in computing the net income of a wholly owned S corporation. The $4,146.02 of tax and interest asserted due in Notice of Deficiency L-016460121 was paid in full via two payments made on April 27, 1999 and August 12, 1999.

4. On October 29, 1999, the Commonwealth of Virginia Department of Taxation corresponded with petitioner Surinder Ahuja indicating that (i) its records reflected that he was a partner of a Virginia partnership; (ii) he received "an income allocation" as a partner of the partnership for 1996; (iii) he might be required to file a Virginia income tax return for 1996;

(iv) it had no record of a Virginia income tax return on file for petitioners for 1996; and (v) he was to submit a copy of his 1996 Virginia return if one was filed or file a return if one was due.

5. Petitioners gave the October 29, 1999 letter to Mr. Mehta, their certified public accountant who had been handling their tax work for the last 15 years. On February 10, 2000, Mr. Mehta sent a letter to petitioners indicating that enclosed was the 1996 Virginia nonresident tax return which reflected a tax due of $22,955.00 and an amended New York State income tax return for 1996 (hereinafter "the second amended return"). The New York State second amended return claimed a refund of $22,955.00 based on the assertion that petitioners were entitled to a resident tax credit of $22,955.00 on their New York State return for taxes paid to Virginia.

6. On February 14, 2000, petitioners met with Mr. Mehta at his office located in his personal residence in North Hills, New York to review both the Virginia nonresident return and the New York State second amended return. Petitioners signed both returns and left them with Mr. Mehta for mailing. Mr. Mehta's office practice is to accumulate all outgoing mail in a tray and at the end of the day the mail is placed in his personal mail box outside of his house for pick-up. Mr. Mehta testified that he had specific recollection of personally placing both the Virginia and New York State second amended returns in his mailbox on February 14, 2000. Both of these returns were mailed by ordinary first class mail. Mr. Mehta does not maintain a mailing log or other record of outgoing mail.

7. On March 13, 2000, approximately one month after the 1996 Virginia nonresident tax return was mailed, petitioners received a letter from the Commonwealth of Virginia Department of Taxation indicating that additional documentation was needed in the review of their 1996 Virginia income tax return. The record herein also contains a letter from the Commonwealth of

Virginia Department of Taxation dated July 26, 2000 which verifies that the tax and interest due on petitioners' 1996 Virginia nonresident tax return was paid in two installments, with the first payment of $22,955.00 posted on February 25, 2000 and the second payment of $13,480.54 posted on April 14, 2000.

8. In November 2000, Mr. Mehta met with petitioners and learned that they had not yet received the $22,955.00 refund claimed on the second amended return. Mr. Mehta immediately called the Division inquiring about the status of the refund and was informed that the Division had no record of receiving a second amended return claiming a refund of $22,955.00. On November 20, 2000, Mr. Mehta forwarded to the Division a copy of the second amended return along with a letter which stated as follows:

> During our conversation with Ms. Marion Cusack of the NYS Department of Taxation on 11/20/00 at 11:30 a.m., we came to know that the department never received Form IT-201X for the year 1996 which was mailed by the taxpayer in February, 2000. As per Ms. Cusack's advice please find a copy of the amended return, process the return and issue the refund as soon as possible.

9. On August 20, 2001, the Division issued a Notice of Disallowance to petitioners advising them that the refund claimed on the 1996 second amended return had been partially denied. The basis for the denial, as stated in the Notice of Disallowance, was as follows:

> We have no record of an amended return being filed in February, 2000, therefore the 1996 IT-201-X amended return dated 11/27/00 must be accepted as your original amended return. Since this return was received out of statute the amount requested for refund cannot be issued. The $4,146.00 payment made on assessment L-016460121, however, will be refunded to you due to the fact that we received your amended return within 2 years of the date that this payment was made.

10. In light of petitioners' contention that the New York State second amended return for 1996 was mailed on or about February 14, 2000, the Division has made several searches of its records in an effort to locate the second amended return. The Division was unable to find any

record of having received the 1996 second amended return purportedly mailed by petitioners' accountant on or about February 14, 2000.

CONCLUSIONS OF LAW

A. As relevant to this proceeding, Tax Law § 687, entitled "Limitations on credit or refund" provides as follows:

> (a) General. --- Claim for credit or refund of an overpayment of income tax shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later . . . . If the claim is filed within the three year period, the amount of the credit or refund shall not exceed the portion of the tax paid within the three years immediately preceding the filing of the claim plus the period of any extension of time for filing the return . . . . If the claim is not filed within the three year period, but is filed within the two year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the two years immediately proceeding the filing of the claim . . . .

In the instant matter, if it is found that the second amended return was filed on or about February 14, 2000, as alleged by petitioners, then there is no dispute that they are due a refund of $22,955.00. It is likewise undisputed that if the second amended return was filed on November 20, 2000, as argued by the Division, then the refund is limited to $4,146.00. Thus, resolution of the issue in question turns solely on a determination as to the date the second amended return was filed.

B. Tax Law § 691(a) provides, in pertinent part, that:

> If any return . . . required to be filed . . . within a prescribed period or on or before a prescribed date . . . is, after such period or such date, delivered by United States mail . . . the date of the United States postmark stamped on the envelope shall be deemed to be the date of delivery . . . . If any document or payment is sent by United States registered mail, such registration shall be prima facie evidence that such document or payment was delivered to the tax commission, bureau, office, officer or person to which or to whom addressed.

When the Division fails to receive a document, the general rule is that proof of ordinary mailing is insufficient as a matter of law to prove timely filing (***Matter of Dattilo,*** Tax Appeals Tribunal, May 11, 1995, ***confirmed Dattilo v. Urbach,*** 222 AD2d 28, 645 NYS2d 352; ***Matter of Schumacher,*** Tax Appeals Tribunal, February 9, 1995; ***Matter of Reeves***, Tax Appeals Tribunal, August 22, 1991; ***Matter of Savadjian***, Tax Appeals Tribunal, December 28, 1990).

C. In the instant matter, I am satisfied that the Division has conducted an adequate search of its records in an effort to locate the 1996 second amended return allegedly mailed on February 14, 2000 and that it has no record of ever receiving said second amended return on or about this date. The Division's records reflect that the first time it received petitioners' second amended return for 1996 was on November 20, 2000. Accordingly, the burden is on petitioners to prove (Tax Law § 689[e]), by one means or another, that they filed the second amended return for 1996 with the Division before the statute of limitations for refund had expired. Mr. Mehta's testimony concerning the mailing of the 1996 second amended return on February 14, 2000, although forthright and sincere, is not sufficient to permit a conclusion that petitioners have met their burden of proving that the second amended return for 1996 was filed with the Division on or about this date (***see, Matter of Dattilo, supra*; *Matter of Schumacher, supra; Matter of Miller v. United States***, 784 F2d 728, 86-1 US Tax Cas ¶ 9261; ***Matter of Sipam Corp.***, Tax Appeals Tribunal, March 10, 1988 [for a general discussion on the filing of various documents with the Division and the Division of Tax Appeals]). While petitioners argue that the Court's decision in ***Matter of Mutual Life Ins. Co. v. State Tax Commn.*** (142 AD2d 41, 534 NYS2d 565) supports their position, I find that the facts present in this matter are distinguishable from the case relied upon by petitioners. Specifically, in ***Mutual,*** the Court found that the taxpayer had adduced compelling evidence with respect to the preparation and mailing of a check and that the Division

failed to produce any evidence that it did not receive the check. The Court noted that the Division's "burden in this regard was light. It needed only to produce some evidence of its procedures when receiving returns and checks or that it had conducted at least a cursory review of its files for the check . . . ." (***Id.***, 534 NYS2d at 567.) As noted above, the Division has made more than a cursory review of its files for the second amended return allegedly mailed on February 14, 2000, and based on results of the searches conducted by the Division I found as a fact that the Division did not receive the second amended return purportedly mailed on February 14, 2000. Accordingly, the facts of this case are clearly distinguishable from ***Mutual***.

D. Petitioners could have avoided any risk of mishandling of the second amended return by the Postal Service or by the Division had they used certified or registered mail (Tax Law § 691[a]; 20 NYCRR 2399.2[b]), since certification or registration serves as prima facie evidence that a document or payment was delivered. However, petitioners chose to mail their 1996 second amended return using ordinary first class mail and therefore they bear the risk of nondelivery or mishandling. It is noted that when issuing a Notice of Deficiency or Notice of Disallowance to a taxpayer, the Division is required to send the notices by certified or registered mail (Tax Law

§ 681[a]; § 689[c][3]) to ensure delivery. Accordingly, I see no inequity in the statute which places the same mailing requirements on a taxpayer to ensure delivery of a document to the Division. Petitioners, once they chose to use ordinary first class mail to mail the second amended return, should have followed up on the status of the claim before the statute of limitations expired.

E. The petition of Surinder and Veena Ahuja is denied and the Division's Notice of Disallowance dated August 20, 2001 is sustained.

DATED: Troy, New York
July 15, 2004

/s/ James Hoefer
PRESIDING OFFICER